91-1298

Supreme Court, U.S.
FILED
JAN 14 1992
OFFICE OF THE CLERK

NO. _____

SUPREME COURT FOR THE
UNITED STATES OF AMERICA
OCTOBER TERM, 1991

DAVID A. NOWICKI,
PETITIONER,

VS

WISCONSIN SUPREME COURT, JUDICIAL ADMINISTRATIVE DISTRICTS 1, 2, & 3, ET AL,
RESPONDENTS,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI

DAVID A. NOWICKI,
IN PROPRIA PERSONA
[NON- ATTORNEY]
2000 CAPELLA CT
WAUKESHA, WI 53186
414-547-9000

I

QUESTIONS PRESENTED

1. Does a litigant have the right to make a private audio recording of the court and court related proceedings for his or her own personal use, as long as it does not interfere with the proceedings? In addition, if it does interfere with the proceedings, is the litigant entitled to a warning about the interference, an opportunity to correct same and further entitled to have all of the above on the record to enable a reviewing court to review the recording denial?

II

2. Does a Notary, hired by a litigant, have the right to make a private audio recording of the court and court related proceedings for the litigant's personal use, as long as it does not interfere with the proceedings? In addition, if it does interfere with the proceedings, is the Notary entitled to a warning about the interference, an opportunity to correct same and further entitled to have all of the above on the record to enable a reviewing court to review the recording denial?

3. Did the respondent Judges and

III

Court commissioners violate the anti-trust laws when they denied the litigant and the notary, hired by the litigant, the right to audio record the proceeding?

IV

PARTIES

The petitioner named the Family Court Judges and Court Commissioner in his original Petitioner for a Supervisory Writ on 3-14-91. The State Supreme Court added the Court of Appeals Judges, the Director of State Courts and the Department of Justice.

1. Hon. Nathan S. Heffernen, Chief Justice of the Wisconsin Supreme Court,
2. Hon. William Eich, Court of Appeals, State of Wisconsin,
3. Hon. William R. Moser, Courts of Appeals, Milwaukee Wisconsin,
4. Hon. Neil Nettesheim, Court of

Appeals, Waukesha, Wisconsin,

5. J. Denis Moran, Director of State Courts, Madison Wisconsin,
6. Robert A. Selk, Department of Justice, State of Wisconsin.
7. Hon. Dominic S. Amato, Circuit Court Judge, Milwaukee County, Family Division,
8. Hon. Stephen A. Simanek, Circuit Court Judge, Racine county, Family Court Division.
9. Hon. Stephen A. Simanek, Family Court Judge, Racine County, Family Court Division.
10. Hon. Victor Manion, Circuit Court Judge, Milwaukee County Court System.
11. Hon. Clarence R. Parrish, Cir-

cuit Court Judge, Milwaukee County, Family Court Division.

12. William Honrath, Asst. Family Court Commissioner, Milwaukee County Family Court Division,

13. Orivlle Pitts, Family Court Commissioner, Milwaukee County, Family Court division.

14. David L. Konkol, Asst. Family Court Comm. Milwaukee County, Family Court Division.

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JURISDICTION

Jurisdiction is invoked pursuant to 28 USC 1651(a) and Rule 10.1(b)(c). This matter has been decided by the Supreme Court of the State of Wisconsin. The final decision was dated 10-16-91.

STATEMENT OF THE CASE

The petitioner is a notary. He is a member of and the President of the Divorced Dads Against Discrimination organization. Divorced Dads Against discrimination is a civil rights organization that it's goal is to educate fathers as to their rights and assist them in asserting them. One of the services Nowicki provides for fellow members is the electronic recording of court proceedings. He has been repeatedly denied the right, as a notary, to make a audio record of court proceedings for fellow members. In addition to being denied the right to make a living providing audio re-

cording services for fellow members, he has also been denied the right to audio record his own post divorce proceedings by Judge Amato.

On 12-12-91, the Hon. Domininc S. Amato denied the petitioner the right to audio record his own post divorce proceeding. He asked the judge, for the record, what his reasoning was for denying him the right to audio record the proceeding. Judge Amato become very upset and stated, " no one asks him for the reasons behind my decisions."

During the discussion on the tape recording denial, Judge Amato stated he was very concerned about the financial welfare of his court

reporter. He had no concern for the litigant that was before him. Judge Amato had the bailiff seize the petitioner's tape recorder. It is the custom, practice and policy for this judge and all other named family judges and court commissioners to permit an attorney to bring in a second court reporter, a private reporter, many of which audio tape the proceeding to enable them to verify the proceeding, to make a private transcript of the proceedings. An explanation from the attorney about the second reporter is not required.

While providing the audio recording services for fellow members, the respondent judges and court com-

missioners have refused to permit the petitioner to record the proceedings. They have, without statutory authority, denied the petitioner the right to make a living.

On 3-14-91, Nowicki filed a petition for a Supervisory Writ [Pet App-1] with the Wisconsin Supreme Court. He sought the following relief: 1.) a Writ from the Supreme Court barring the respondent judges and court commissioners from interfering with his recording services. In addition, he sought an order barring Judge Amato from interfering with his right to record his own proceeding. He went on to demonstrate to the Supreme Court how

the problem was statewide. He also informed the Wisconsin Supreme Court that he had been successful three times in obtaining favorable decisions from the Court of Appeals on the tape recorder issue.

On 6-10-91, the State Supreme Court issued a decision [Pet App 2] stating that Nowicki's petition had merit and that they would commission a study to look into the matter. They then, without any explanation, dismissed Nowicki's petition ex parte.

On 6-24-91, Nowicki filed a motion to reconsider. In his motion [Pet App 3] to correct and/or amend, he requested a permanent injunction

against the respondent judges an their successors.

On 10-16-91, the State Supreme Court denied his motion [Pet App 4], however, three of the Supreme Court Judges dissented from the majority. The Honorable Shirley S. Abrahamson, writing for the dissent, stated that she did not agree with the decision of the Supreme Court. She went on to state in her decision that if Nowicki's petition had merit, the court should not dismiss it. She further stated, the right of litigants to make a record of judicial proceedings, in which they participate, is a vital facet of public access to the courts. She went on to

say that the lack of a record in the family court commissioner's proceedings is a continuous problem, see In the Matter of Disciplinary Proceedings Against John J. Crosetto, 160 Wis 2d 581, 6054, 406 N.W. 2d 879 (1991).

ARGUMENT

To deny a litigant the right to record the proceeding is a procedural and substantive deprivation of due process. There is no logical explanation for the denial except that a judge or court commissioner want to retain the right to edit and/or sanitize the transcript. This is not a new issue. The U. S.

Supreme Court, in 1946, addressed this very issue. In Craig v. Harney, 331 U.S. 367, 374 (1947), Justice William O. Douglas speaking for the United States Supreme Court said:

> "There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it."

Further authority for the use of the tape recorder is Forsythe v Family Court Commissioner, 131 Wis 2nd 322, 326. This is also legal pursuant to Wis. Stat. 968.31 (2)(c) which states in part:

> ... or where one of the parties to the communication has given

> prior consent to the interception..

It is the custom, practice and policy for the judges and court commissioners to permit an attorney to bring in a court reporter to make a private record of the proceedings. Two of the Family Court Commissioners, Orivlle Pitts and David Konkol, tell the litigants that the petitioner cannot electronically record the proceedings, however, if they wish to hire a court reporter, at a cost of $3 a page, they will permit the recording. The purpose and intent of the commissioners and judges that make this statement is to get rid of the fellow member of the Divorced Dads organization. This con-

duct is violative of the Wis. Anti Trust Laws of Chapter 133, most specifically, sec. 133.03(1)(2), 133.04(1)(2), 133.05(1). This is a poor man's stenographer.

This practice forces poor litigants to purchase transcripts in an effort to determine whether they should appeal the decision or not. This practice also discourages legal malpractice inquiries. This practice also denies the poor the ability to have an instant replay of the proceedings, therefore, they are denied an opportunity to level out the playing field.

This is also a concerted effort to discourage fathers from asserting

their constitutional rights to gain and/or retain access to their children. It also serves as a deterrent to challenges to the unfair excessive child support orders that the father are forced pay. The cost of the transcript causes the poor to be denied access to the court system.

In the State of New Mexico, all court proceedings are recorded on audio tape. All litigants can afford a tape of the proceedings which cost them $4. This inexpensive record cost, in conjunction with the low cost of $25 filing fee for an appeal, make it possible for all citizens to access the appellate system.

In some of the cases that the denial to tape record took place, the litigants cannot afford and attorney, cannot afford a transcript and in addition cannot afford the child support payments. The inability to pay child support is often the reason they are in court.

In addition to the arguments previously mentioned on the right of a Notary to make a private record of the proceeding for fellow member litigants, it is the most efficient and cost effective method of litigation support. It provides the litigant with the capability of verifying the transcripts and also the ability to decide whether they want

to buy one at all. This process is governed by Northern Pacific Railway Co. v U.S., Wash (1958), 78 S. Ct. 514, 356 U.S. 1, 2 L. Ed. 2d 545, see also Lewis-Westco & CO. v Alcoholic Beverage Appelass Bd., 1982, 186 Cal Rptr. 552, 136 C.A. 3rd 829, Cert Denied, 104 S. Ct. 193, 464 U.S. 863, 78 L. Ed. 2d 170.

CONCLUSION

Bases upon all of the above facts and case law, this petitioner request the following relief:

1. Find that a litigant has a right to make a private audio record of the court, or court related

proceeding, so long as the recording method does not interfere with the proceeding.

2. Find that a notary, hired by a litigant, has the right to make a private audio record of a court or related court proceeding as long as the recording method does not interfere with the proceeding.

3. Find that the named respondent Family Judges and Family Court Commissioners have violated the anti-trust laws when they refused the litigant and the notary, hired by the litigant,

the right to make a private audio recording of the proceeding.

Dated At Waukesha Wisconsin this 30th day of January, 1992.

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APP-1

SUPREME COURT OF WISCONSIN

State ex rel. David A. Nowicki

vs

Judicial Administrative District 1, 2, and 3, and Appellate District 1, 2, and 4

PETITION FOR SUPERVISORY WRIT

David A. Nowicki, in propria persona, hereby petitions the Supreme Court of the State of Wisconsin, for a Superintending Writ, pursuant to Wisc. Stats. 809.51, for and order directing the Circuit Courts and Family Court Commission-

ers within the Judicial Administrative District 1, 2, and 3 and the Appellate Districts 1 2, and 4 to discontinue the following practices:

1. To cease and desist from interfering with a litigant, represented by counsel or in propria persona, of their right to make a private record of any proceeding with a tape recorder, provided the taping does not interfere with the proceedings. Further instructions, that if there is an interference, the court is to notify the parties of the interference, allow them an opportunity to correct the interference prior to terminat-

ing their recording, and all discussion of same are to be on the record so as to allow a reviewing court a complete record of same.

2. To cease and desist from interfering with a Notary that has been hired by a litigant to make a private record, by means of an electronic tape recording machine, of any judicial proceeding, before a circuit court or a family court commissioner.

Grounds:

3. The Supreme Court has the authority to promulgate the Judicial Code of Ethics and Rules for all inferior courts, see

Petition of Heil, 230 Wis 428.

4. The authority for the State Supreme Court to function in a general superintending control over all inferior courts in expressly set forth in Art. VII, Sec. 3, of the Wisconsin Constitution.

5. The promulgation of the Code of Ethics was to set standard to eliminate conflicts and confusion. The duties of the Supreme court are to manage the State-Wide Judicial System.

6. The constitutionally authorized powers of the State Supreme Court are as broad and as responsive as is necessary to meet

the changing needs and circumstances to insure the due administration of justice in the State of Wisconsin. See in re: Hon. Charles E. Kading, 70 Wis 2d 508.

In a unanimous order by the Court in which the code was promulgated, we declared:

"We hold this court has an inherent and an implied power as the supreme court, in the interest of the administration of justice, to formulate and establish the Code of Ethics accompanying this opinion. It governs judicial acts of a judge in his offi-

cial capacity and certain personal conduct which interferes or appears to interfere with the proper performance of his judicial conduct. This power, inherent in the supremacy of the court and implied from its expressed constitutional grants of supervisory power, embraces all members of the judiciary including members of this court not only because they are lawyers but also because they are judicial officers in a court system constituting the judicial branch of the state government with a solemn duty

to perform their judicial duties well."

FACTS OF THE STATE-WIDE PROBLEM

7. The problem of an individual being denied the right is to make a private audio record, for their personal usage, is continuous and ongoing throughout the above mentioned judicial administrative and appellant districts.

8. The problem of a Notary being denied the right to make a private record, for clients, of judicial proceedings, both in circuit court and in family court commissioner's hearings, is continuous and ongoing in the above

mentioned judicial and administrative districts.

9. Unpublished decisions have been issued by the appellate courts regarding the use of a tape recorders in District I, Nowicki v Nowicki, (unpublished) Appeal no. 86-1920, in district 4, In State ex rel, George Addo v Hon. Danforth, (unpublished) appeal no. 89-0745, and finally, the published decision of Forsythe v Family Court Commissioner, 131 Wis 2d 322, 326.

10. There is much confusion in the appellate districts over the right to use a tape recorder, by litigants and Notaries, and

the direction, by use of a superintending writ, of the Supreme Court on this issue is needed to clear the confusion and in the interest of an efficient judicial system.

11. The lower courts, family court commissioners included, continuously refuse to honor the right of litigants on a daily basis to privately record the proceedings with a tape recorder. They also deny a litigant the right to make a private record of the proceeding by hiring a Notary with audio recording equipment.

12. This above practice is also

violative of Anti Trust Laws as set forth in Chapter 133 of the Wisconsin Statutes, which most specifically states that the intention of the legislature was to encourage competition in all areas.

13. The act of recording the proceedings, by stenographic or electronic means, does not interfere with the ability of a court to perform its judicial functions and acts. The control of the recording of the proceeding is a ministerial and not a judicial act. Judges who interfere with the right to record proceedings shed them-

selves of their absolutely immunity.

14. This petitioner is not an attorney, however, he is a Notary and is frequently hired by fellow members of the DADS organization to make a private record of the proceedings.

15. The petitioner has been denied the rights to record frequently in all of the above mentioned listed appellate district. There are voluminous complaints in the judicial commission filed by the petitioner on this subject. The petitioner got tired of writing complaints on this subject.

16. The chief judges of the 1st and 2nd appellate districts have been ineffective in setting policy requiring all judges to permit the audio recording of proceedings.

Pursuant to Rule 809.52, the petitioner further requests that the court issue a temporary order permitting the petitioner to provide his services, for individuals and fellow members, as a Notary, to tape record hearings. Also, the petitioner requests the Supreme Court issue a temporary order permitting him and fellow members of the DADS organization, to record the proceed-

ings in the following cases:

1. Hon. Dominic S. Amato in Nowicki v Nowicki, case no. 606-664, Milwaukee County Family Matter, post divorce matters.
2. Hon. Stephen A. Simanek in Masters v Eisenbart, case no. 90-cv-862 which is post temporary restraining order.
3. Family Ct. Comm. William Honrath in Masters v Eisenbart, case no. 90-cv-862, which is for post temporary restraining order.
4. Hon. Stephen A. Simanek in the post paternity matters of Eisenbart, case no. PA 88-0456.
5. Fam. Ct. Comm. William Honrath in the post paternity matters of

Eisenbart, case no. PA 88-0456.

6. Hon. Dominic S. Amato in the post divorce judgement matters of John Christiansen, case no. 770-904.

7. Hon. Stephen A. Simanek in the Van Nice v Van Nice post divorce matters, case no 89-FA-903.

8. Fam. Ct. Comm. Wm. Honrath in the Van Nice v Van Nice post divorce judgement matters, case no. 89-FA-903.

9. Hon. Stephen A. Simanek and Family Ct. Comm. Honrath are the most flagrant violators in Racine County. In addition, Commissioner Honrath is the most obnoxious boor that I have met,

in recent times, as a Court Commissioner.

9. The most flagrant violators in the Milwaukee County Family Court Commissioner's office, of an individual's rights to tape record hearings and the right of a Notary to tape record hearings for members, are Fam. Ct. Comm. Orville Pitts and Fam. Ct. Comm. Konkol.

10. Hon. Victor Manion in the Scott V Scott review of a restraining order matter, case no. 90 FA 905703. IN addition, case no 632-772, is the family matter of Scott v Scott.

11. Hon. Clarence R. Parrish in

Rawson v Rawson, case no. 650-023, which is a post divorce matter. This judge feels this is a negotiable right.

12. Many of the lower courts publicly state the Forsyste Decision does not apply to them and they ignore it.

Submitted this 10th day of March, 1991.

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APP-2

SUPREME COURT
STATE OF WISCONSIN

June 10, 1991

To: See Attached List

The Court today announced an order in your case as follows:

State ex rel. David Nowicki v. Judicial Administrative Districts 1. 2 and 3. et al.

Case No.91-0G16-W

On March 14, 1991 David Nowicki filed a petition asking this court to direct the circuit courts and family court commissioners in Judicial Administrative Districts 1, 2 and 3

and Districts I, II and IV of the Court of Appeals to discontinue their alleged practice of interfering with a litigant's making a private record of a proceeding with a tape recorder, provided the tape recording does not interfere with the proceeding. The petition also asked the court to order the respondents to cease and desist from interfering with a "notary" hired by a litigant to make a private record of any judicial proceeding before a circuit court or family court commissioner by means of a tape recorder. The petition further asked that the court issue a temporary order permitting the petitioner to provide

recording services as a "notary" at hearings in four cases pending in the circuit courts and permitting him and others to record proceedings in those cases. The matters raised by the petition come within the court's constitutional superintending and administrative authority over all courts and are of sufficient concern that the court will direct a study to be conducted and recommendations submitted addressing them.

IT IS ORDERED that the petition for supervisory writ is denied ex parte, pursuant to secs. (Rules) 809.71 and 809.51, Stats.

APP-3

SUPREME COURT OF WISCONSIN

State ex rel. David A. Nowicki

v.

Judicial Administrative District 1, 2, and 3, and Appellate District 1, 2, and 4

MOTION TO AMEND/CORRECT THE ORIGINAL PETITION FOR A SUPERVISORY WRIT AND MOTION TO RECONSIDER DENIAL BASED ON THE AMENDED PETITION'S REQUEST FOR PERMANENT INJUNCTION

TO: All parties of record

Authority: This motion is being brought before the Supreme Court

Pursuant to Wis. Stat. 809.14 & 809.64.

Now comes the petitioner, David A. Nowicki, in propria persona, to petition the Supreme Court of the State of Wisconsin, for permission to correct/amend his original Petition for a Superintending Writ. This matter is being brought before the court pursuant to Wisc. Stats. 809.14 and 809.64. The petitioner requests that the Supreme Court permit the petitioner to amend/correct his original petition to include the following language in the order:

1. An order granting the petitioner a permanent injunction barring the respondents, and all present

and future sitting judges and court commissioners, from interfering with his right to audio record the proceedings in his own case.

2. An order granting the petitioner a permanent injunction barring the respondents, and all presently sitting and future judges and court commissioners, from interfering with the petitioner's lawful right to provide his clients the service of an audio recording of any judicial proceedings in the future.

3. An order, after the completion of the study and a final determination by this court, requir-

ing that the final decision be published.

Grounds:

4. The petitioner, in propria persona, non attorney, inadvertently failed to include in his original petition a request for a permanent injunction barring the respondents, all presently sitting judges, all future judges, all presently sitting court commissioners and all future court commissioners, from interfering with his lawful right to audio record his own hearing court proceedings and also his lawful right, as a Notary, to provide his clients

the service of making a private audio record of any judicial proceeding. The word clients is intended to mean the parties to litigation.

5. The grounds for the publication are:

a.) This decision will clear up state wide confusion,

b.) This decision will improve the services of lawyers because it will be inexpensive, verifiable, ability to be instantly replayable and cost justifiable,

c.) This decision will provide the poor with their own in-

expensive private record of the proceedings,

d.) Justice requires it.

Submitted this 21th day of June, 1991.

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APP-4

Office of the Clerk

SUPREME COURT

231 E. STATE CAPITOL

P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

TELEPHONE 608-266-1880

October 16, 1991

To: See Attached List

You are hereby notified that the Court has entered the following order:

State ex rel. Da#id Nowicki v. Judicial Administrative Districts 1, 2 and 3, et al.

Case No. 91-0616-W

On June 25, 1991, David Nowicki

filed a petition seeking reconsideration of the court's denial of his petition for supervisory writ and seeking to amend that petition, filed March 14, 1991, to include requests fir permanent injunctive relief.

It IS ORDERED that the motion for reconsideration and to amend the petition is denied.

ABRAHAMSON, CALLOW and BALLITCH, JJ., dissent; opinion filed.

Shirley S. Abrahamson, J. (dissenting). By order of June 10, 1991, the court denied David A. Nowicki's petition that sought redress in this court for what he asserts is his personal right to tape-record

his own court proceedings and to provide a recording service to others, Note 1. The court concluded that the matters raised by the petition came within the court's constitutional superintending and administrative authority over all courts and were of sufficient concern to warrant a study. The court ordered the district court administrators to study the recording of proceedings before court commissioners and circuit courts and to report their recommendations to the court by December 1, 1991.

On June 24, 1991, the petitioner filed a motion to reconsider the denial and to amend/correct the

original petition. Because the study and this court's action after the study may not provide relief to Mr. Nowicki personally, I am persuaded that the court should reconsider the petition, allow the amendments to the petition, forward the petition to the district court adminis-trator s so that they might see the nature of Mr. Nowicki's complaints, and hold the petition in abeyance until the study is completed.

If Mr. Nowicki's assertions have merit, this court should address the petition, not dismiss it. The right of litigants to make a record of judicial proceedings in

which they participate is a vital facet of public access to the courts. This court held in Forsythe v. Family Court Commissioner of Dane County, 131 Wis. 2d 322, 327, 388 N.W.2d 580 (1986), that a family court commissioner may not restrict a litigant's right to make a stenographic record of proceedings except when the commissioner finds the recording "significantly impedes achievement of the essential purposes of the proceeding ". note 2

For the reasons set forth, I would grant Mr. Nowicki's motion to reconsider the denial of his petition and to amend his petition and would hold the petition in abeyance

until the study is completed.

I am authorized to state that Justices William 6. Callow and William A. Bablitch join in this dissent.

Note 1: To support his various claims, Mr. Nowicki cited (1) two unpublished court of appeals' orders reversing circuit court order s that deny litigants the right to tape-record judicial proceedings and directing the circuit court to allow litigants to tape-record (State ex rel. Addo v. Danforth, No. 89-0745-LV, unpublished orde r dated July 20, 1989; Carlson v. Nowick#, No. 86-1920, unpublished order dated May 29, 1987), and (2) nine cases in which the circuit court or family court commissioner has, he asserts, illegally prohibited tape-recording.

Note 2: While the Iitigant's record does not constitute an official record, it may often be the only record of the proceedings. The lack of an official record of certain proceed-ings before family court

commissioners is a recurring problem. See In the Matter of Disciplinary Proceedings Against John J. Crosetto, 160 Wis. 2d 581, 605, 466 N.W.2d 879 (1991) (Abrahamson, J., and Ceci, J., dissent.